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No. 91-1047

In The

Supreme Court of the United States

October Term, 1991

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY GEORGIA, Individually and d/b/a GWINNETT AMBULANCE SERVICES,

Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of Georgia complied with this Court's mandate to reconsider its ruling in *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989), in light of the due process standards recognized and applied in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___ (1991)?

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BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

As a jurisdictional matter, the only issue that now can be brought before this court is whether the Georgia Supreme Court correctly applied the due process standards set forth in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___ (1991) when it reaffirmed the award of punitive damages to Respondent. Petitioner, however, attempts to raise before this Court a more generalized due process and equal protection challenge to the Georgia

Supreme Court's ruling below.[1] This attempt to expand the scope of review is inappropriate. In its briefs on remand and at oral argument below, Petitioner advanced only the narrow due process argument that under *Haslip* the propriety of punitive damages was determined predominantly, if not exclusively, by looking at the ratio between compensatory and punitive damages.[2] In this vein, Petitioner acknowledged below that *Haslip* found the common law method for assessing punitive damages not to be *per se* unconstitutional.[3] The Petitioner accordingly dropped its general constitutional attack on Georgia's scheme for the award of punitive damages and

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[1] In Question 2, which has four sub-parts based either on due process or equal protection grounds, the Petitioner raised three variations on the void for vagueness doctrine and argued the Georgia law violated equal protection. Petition for Writ of Certiorari at i.

[2] In the Appendix to Respondent's Brief in Opposition, both briefs submitted by the Petitioner Hospital Authority on remand in this case are included in full. An examination of both will disclose that the issues set forth in Question 2 were not raised before the Georgia Supreme Court. This is borne out by the Georgia Supreme Court's ruling below reaffirming the award of punitive damages. *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991).

[3] Brief of Appellant on Remand, Respondent's Appendix at A-5.

confined its argument thereafter to the narrow question of *Haslip's* impact, if any, on the original opinion in this case.[4]

In Respondent's view, only this question is now properly before this Court pursuant to 28 U.S.C. § 1257(a). It was the constitutional question sent back for further consideration on remand, the only question put before the Supreme Court of Georgia and the only question, in fact, decided.[5] Respondent received its copy of the Petition for Certiorari in this case on December 30, 1991 and this Brief in Opposition is filed within the thirty-day time period provided for under Rule 15.2 of the Rules of this Court.

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[4] The Georgia Supreme Court noted as much when it stated that the "principal argument on remand is confined to the issue discussed in Division 1." *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 615, 409 S.E.2d 501, 503 (1991). The reference to Division 1 of the Georgia Supreme Court's opinion on remand was to the ratio argument advanced by the Petitioner.

[5] This Court has long followed the rule that it will not in the exercise of its certiorari jurisdiction consider any federal question unless the question has been presented to the lower court whose decision is under review. In *Webb v. Webb*, 451 U.S. 493 (1981,) this Court explained the reasons for the rule:

> There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the party the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to

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STATEMENT OF CASE

1. Jury Trial

Respondents believe that the statement of facts by the Georgia Supreme Court in its two prior rulings is adequate for consideration of the present petition.[6] Respondent, therefore, would only like to emphasize certain factors. First, the case was litigated as a punitive damages case from the very outset and the Petitioner was well aware of what to expect. Petitioner viewed this as a constitutional test case and shaped its trial and motion strategy accordingly. Second, the Respondent proved liability for both negligence and the award of punitive damages by: (a) showing that Mr. O'Kelley had been

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exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to the state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own work load, this is a very substantial matter. *Id.* at 500-501.

[6] *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989); *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991).

improperly routed to Joan Glancy Hospital (rather than Grady Hospital in Atlanta) for reasons that were economic in nature and largely unrelated to medical considerations; and (b) demonstrating that the helicopter carrying Mr. O'Kelley was directed to the Joan Glancy Hospital parking lot, a location that was unsafe for such helicopter landings and was known to be unsafe for such landings by Hospital Authority officials for several years prior to the O'Kelley accident. Third, under the Georgia Supreme Court's decision in *Moore v. Thompson*, 255 Ga. 236, 336 S.E.2d 745 (1985), the Petitioner had the right to request a bifurcated trial with the jury hearing evidence first on the questions of negligence and the *propriety* of punitive damages and then reconvening, if necessary, to determine the *amount* of punitive damages to be awarded.[7] Fourth, the Petitioner elected not to pursue its option under *Moore v. Thompson* and as a result was required to try all issues in a unitary proceeding followed by a single jury verdict. Not surprisingly, the Petitioner's strategy in the defense of this case was to deny all liability. Specifically, the Petitioner denied responsibility for the helicopter crash in the Joan Glancy Hospital parking lot by arguing that the sole cause was pilot error.[8] In

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[7] The bifurcated trial procedure is now mandatory for cases involving demands for punitive damages arising after July 1, 1987. O.C.G.A. § 51-12-5.1(d).

[8] In addition, the Petitioner disputed testimony about the Hospital Authority's practice of routing ambulances in emergency situations to its own facilities rather than sending them to closer or more medically appropriate hospitals.

taking this position, the Petitioner dismissed the possibility that punitive damages might be imposed and did not present any evidence relative to the *amount* of such an award. To understand the due process issue raised in this case, it is crucial for the Court to understand the strategic significance of the Petitioner's refusal to request a bifurcated trial and to insist on an all-or-nothing defense. Fifth, in fixing the award of punitive damages, the jury in this case was authorized to evaluate not only the harm actually inflicted by the Petitioner, but also the gravity of the risks created by Petitioner's misconduct. While the additional physical harm to Mr. O'Kelley may have been relatively minor in light of the serious burns that he had already suffered, the jury was aware that two people had died in the helicopter crash and a third escaped without serious injury. If there was any need to underscore the gravity of the risks created by the Petitioner in using the parking lot as a landing area, the two deaths in the helicopter crash graphically provided it.[9]

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[9] Another factor that may have influenced the jury to award $1.3 million dollars in punitive damages was the Hospital Authority's emphasis at trial on Mr. O'Kelley's 1% chance of survival. Though the odds were stacked against him, Mr. O'Kelley did struggle for his life for six days before ultimately dying. The Hospital Authority conveyed a feeling to the jury that Mr. O'Kelley's 1% chance of survival really did not amount to much. The Hospital Authority's cold, rather statistical approach to the tragedy in this case conveyed a callousness on the part of the Hospital Authority that the jury did not and could not overlook. The jury verdict in this case may well have rested on the premise that the Hospital Authority had to

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2. Presentation of Constitutional Issues Below

Apart from the Petitioner's failure to request a bifurcated trial, there is another procedural dimension to this case that bears consideration by the Court. The Petitioner *never* made an evidentiary based challenge to the amount of the jury's punitive damage award. A review of Petitioner's theory of defense will disclose that the constitutional issues raised were part of a general strategy to invalidate Georgia's common law scheme for the award of punitive damages. Prior to trial, Petitioner filed a Motion to Dismiss, or in the Alternative, to Strike Plaintiff's Claim for Exemplary Damages on July 7, 1988. This motion included systemic arguments against punitive damages based on the due process and equal protection clauses of the Fourteenth Amendment and the excessive fines clause of the Eighth Amendment.[10] At trial, the Defendants made an oral motion for directed

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understand more clearly the moral and legal significance of its serious disregard for human life. So viewed, the jury's decision to award punitive damages against the Hospital in this case was a rational decision. Given the loss of life in this episode, the threat to the lives of others and the coldness of the Hospital Authority position before the jury, the award of $1.3 million dollars in punitive damages can be seen as a serious effort on the part of the jury to deter the Hospital Authority from engaging in future misconduct of a similar nature.

[10] Petition for Writ of Certiorari, A-26 to A-29.

verdict and that motion was based on both general evidentiary insufficiency and the constitutional arguments made in the previous motion to dismiss.[11] Prior to the instruction of the jury, Petitioner excepted to the trial judge's proposed charge on punitive damages and stated that the basis for the exception was previously set forth in its motion for a directed verdict which in turn made reference to the pre-trial motion to dismiss.[12] To that point, the only constitutional issues in the case were general, systemic challenges to the system for the award of punitive damages in Georgia. None was linked to the jury verdict in this case because it was yet to be rendered. None of those issues remains in the case.

After trial, the Petitioner filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative for a New Trial.[13] This motion merely repeated the *general* constitutional arguments already made and stated that the verdict and judgment were contrary to both evidence and law and should be set aside. Of great significance to the consideration of the present Petition for Certiorari is the fact that the Petitioner *never* put any countervailing evidence before the jury, attempting to demonstrate, rather than simply assert, excessiveness.

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[11] Petition for Writ of Certiorari, A-32.

[12] Petition for Writ of Certiorari, A-35.

[13] Petition for Writ of Certiorari, A-36 to A-40.

For example, Petitioner could have made an offer of proof on the following: (a) the Hospital Authority's financial condition; (b) any disciplinary action taken against officials responsible for directing the helicopter carrying Mr. O'Kelley to land in the Joan Glancy Hospital parking lot; (c) any post-accident measures implemented to insure that if helicopters were going to land in the Joan Glancy parking lot in the future, there would be a safe area for such landings; (d) any settlements or judgments rendered in favor of the other accident victims in the case, including the two individuals who died, and the amount attributable to punitive damages. This evidence, if it existed, might have persuaded the trial judge that the jury's award of punitive damages was inappropriate. For whatever reason, the Petitioner abandoned the last procedural chance that it had to make an evidence specific challenge to the jury award now under challenge.

REASONS FOR DENIAL OF PETITION FOR CERTIORARI

1. As noted in the Georgia Supreme Court's *original* ruling in this case, the standards governing the award of punitive damages are quite detailed. They may include: (1) the nature and egregiousness of the defendant's conduct; (2) the extent and duration of defendant's wrongdoing and the possibility of its recurrence; (3) the intent of

the defendant committing the wrong; (4) the profitability of the defendant's wrongdoing; (5) the amount of actual damages awarded; (6) previous awards of punitive damages against the defendant; (7) potential or prior criminal sanctions against the defendant based upon the same wrongful acts; and other pertinent circumstances.[14] Finally, the Court indicated that under the Tort Reform Act of 1987, which makes bifurcated trials mandatory, even evidence of the financial circumstances of the defendant might be admissible.[15] It is important to understand that these evidentiary categories illustrate the factors which can be used in Georgia to guide the jury in determining punitive damages in a particular case. In fact, it is fair to say that under Georgia law a defendant can introduce any evidence relevant to the amount of punitive damages. The jury, however, cannot consider any of these factors and a trial judge cannot charge with respect to them unless evidence is presented. Here, the Petitioner's failure to ask for a bifurcated trial and its further failure to present any evidence whatsoever on the amount of punitive damages is highly significant.[16] Respondent

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[14] *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 764 n. 13, 386 S.E.2d 120, 124 n. 13 (1989).

[15] *Id.*

[16] In a bifurcated trial, the burden of persuasion to demonstrate the right to an award of punitive damages rests on the plaintiff. This decision is made by the jury in the first phase of

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views the Petitioner's arguments as an attempt to overcome what would be treated as a procedural default in other circumstances.[17]

2. The Georgia Supreme Court in its first ruling emphasized that the standards for awarding punitive damages under Georgia case law were both *substantively* fair and *procedurally* adequate. In this vein, the Court noted that the jury could not award punitive damages without satisfying a *scienter* requirement; in other words, before a jury could render any punitive damages award in favor of the Plaintiff, the evidence had to show an awareness of the gravity of the risks that a particular course of conduct created.[18] In addition, the Court

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the bifurcated trial. If the jury determines that the award of punitive damages is appropriate in the first phase, it then makes a decision as to the proper amount of punitive damages in the second phase. At that juncture, there is no additional burden of persuasion on the plaintiff. As a practical matter, the defendant must produce some evidence going to amount in order to have any chance of limiting punitive damages. The procedural benefit to the defendant of a bifurcated trial is that it provides an alternative to the all or nothing strategy that is typical of cases where punitive damages are sought and the trial is not bifurcated. Yet, the Petitioner tried the punitive damages issue in this case in a unitary proceeding. Any complaint that the Petitioner has with the verdict in this case cannot fairly be directed at substantive or procedural deficiencies in Georgia law.

[17] *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[18] *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 763, 386 S.E.2d 120, 124 (1989).

reviewed the procedural steps available to a defendant to get relief in the event of an excessive punitive damages verdict.[19] In Georgia, the *trial judge* has considerable discretion to set aside a jury verdict. It is difficult, however, for that discretion to be exercised if the defendant does not give the trial judge an evidentiary predicate for doing so. This is all the more true when the scheme for *appellate* review of jury verdicts is considered. As the Supreme Court of Georgia noted in its original ruling, an appellate court does have the authority to set aside oppressive jury verdicts.[20] It chose not to set aside the punitive damages verdict and explained why. On the record in this case,[21] the Georgia Supreme Court's original decision to uphold the punitive damages verdict of $1.3 million dollars is rational and understandable.

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[19] 259 Ga. at 764-766, 386 S.E.2d at 125-126.

[20] *Id.*

[21] As mentioned earlier, there were two deaths in this accident. In addition the lives of two others, including Mr. O'Kelley, were seriously jeopardized. There was also expert testimony establishing that the Joan Glancy Hospital parking lot was unsafe as a helicopter landing site and that Hospital Authority officials had been aware of that for several years. Finally, after the helicopter crash in this case, there was an incident in the spring of 1988 involving, quite by chance, another burn victim. One of the physicians on duty at Joan Glancy Hospital ordered the helicopter to bring the victim to

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3. For the reasons just discussed, Respondent believes that Georgia's system for the award of punitive damages satisfies all due process requirements set forth in *Haslip*. *Haslip* held that in general the common law system for awarding punitive damages was constitutionally sound. Three elements must coexist for the system to operate in a constitutionally fair manner in a specific case: (a) to withstand a vagueness challenge, the standard for awarding punitive damages in the first instance must be reasonably clear;[22] (b) to meet the requirement of rationality, the factors governing the size of a punitive damages award must be objective in nature and logically related to the purpose underlying punitive damages, which in the case of Georgia is strictly limited to what is necessary to deter future misconduct by the wrongdoer;[23] and (c) to assure factfinding accuracy, the

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Joan Glancy. A police officer who had been present at the scene of the O'Kelley helicopter crash was present in the Joan Glancy emergency room at the time. He and another nurse immediately told the physician that his recommended action should not be taken. But for their intervention, more lives would have been placed at risk.

[22] *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032, 1044 (1991).

[23] *Id.* 111 S. Ct. at 1045. Under Alabama law, a jury is authorized to award punitive damages for the purposes of both deterrence and retribution. In contrast, under Georgia law punitive damages can only be awarded for the purpose of deterrence and the jury's discretion is specifically directed to return a verdict in an amount appropriate to deter only the defendant in the case. Georgia law does not allow a punitive damages award for the purpose of deterring third parties. O.C.G.A. § 51-12-5.

jury's determination of punitive damages must be procedurally structured so that the ultimate award, if any, genuinely serves the purpose underlying punitive damages.[24]

As Respondent views the litigation of this case on remand, the Hospital Authority did not argue that Georgia's standard for the *imposition* of punitive damages is unconstitutionally vague. Given this Court's discussion in *Haslip* and the Georgia Supreme Court's emphasis on the scienter requirement, the Petitioner's abandonment was realistic. Nor did the Hospital Authority contend that the factors in Georgia relevant to the *amount* of punitive damages were inappropriate. This abandonment likewise was realistic in light of footnote 13 of the original *Jones* ruling. Respondent prepared a chart comparing the factors recognized in Alabama with those in Georgia and presented that chart in oral argument on remand. The chart is set forth below:

Factors Governing the Award of Punitive Damages: Comparison of Alabama and Georgia Standards

Alabama	Georgia
1. Reasonableness of relationship between punitive damages award and harm *likely* to result from D's conduct as well as harm that *actually* occurred?	1. Yes. Jury can consider nature and egregiousness of D's conduct and the amount of actual damages awarded.

[24] 111 S. Ct. at 1045-1046.

Alabama	Georgia
2. Reprehensibility of D's conduct and its duration plus D's awareness of and attempts to conceal conduct.	2. Yes. Jury can consider nature and egregiousness of D's conduct plus its duration and possibility of recurrence.
3. Existence and frequency of similar past conduct.	3. Yes. As part of jury consideration of egregiousness of D's conduct.
4. Profitability to D of wrongful conduct and desirability of removing profit and having D sustain a loss.	4. Yes.
5. Financial position of D.	5. Yes.
6. Total cost of litigation.	6. Not specifically mentioned, but relevant as "other pertinent circumstances". See #9.
7. Imposition of criminal sanctions on D, a factor to be taken in mitigation.	7. Yes.
8. Other civil awards for same conduct, also a factor to be taken in mitigation.	8. Yes. But limited to other punitive damages awards based on same conduct.
	9. Any other pertinent circumstances.
Green Oil Co. v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989).	*Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 764 n. 13, 386 S.E.2d 120, 124 n. 13 (1989).

It is highly significant that both the Alabama and the Georgia standards for the award of punitive damages rest on a multi-factor approach that gives both sides a full and fair opportunity to develop evidence that is reasonably related to the *amount* of punitive damages to be awarded. It is up to the litigants, however, to decide what evidence they want to bring to the attention of the jury. If a defendant chooses to deny all liability as the Petitioner did in this case, how can it be complained that a constitutional deficiency in the law resulted in an unreasonably large punitive damages verdict? The jury surely cannot be asked, much less required, to consider factors relevant to the award of punitive damages that are not supported in the evidence.

4. Respondent suggests that the Petitioner has acknowledged that Georgia law generally satisfies the due process standards of *Haslip*. On remand, the systemic arguments gave way to the only constitutional issue remaining open to the Petitioner which was a challenge to the size of the jury verdict in this case. Bear in mind here that Petitioner cannot seriously contend that the record lacks evidence to support the award of punitive damages in the first instance. The Petitioner's dilemma is the *absence* of any evidence in the record to contest the $1.3 million dollars award in this case or more particularly to suggest why a different punitive damages award would be more rational. This puts the focus on Petitioner's ratio argument. Petitioner uses it because of its abstractness. It is the only argument that can be made without reference to the evidentiary record in the present case.

The flaw in Petitioner's ratio argument is that it contradicts the Court's basic reasoning in *Haslip*. It seems clear that the Court did not approve Alabama's multi-factor approach to the award of punitive damages at the beginning of the opinion and yet at the end reduce all due process analysis to a single factor test based on the ratio between compensatory and punitive damages. Alabama's scheme for awarding punitive damages clearly permits a jury to award punitive damages based on either the risk of harm created or the harm that actually results from serious risk-creating conduct. Georgia's law in this regard is the same as Alabama's. Respondent would suggest that the relationship between compensatory and punitive damages might provide a reference point for evaluating whether a verdict deters too little or too much in a particular case. But there is nothing in the majority's reasoning in *Haslip* to suggest that it is anything more than a factor in the overall analysis that a jury or a reviewing court is called upon to make.

Of course, the Georgia Supreme Court in its original ruling and again on remand stressed that a comparison between actual and punitive damages is appropriate in some cases, perhaps even decisive.[25] But, in other cases, the comparison was not regarded as helpful. The present case fit into the latter category. The Georgia Supreme Court gave these reasons:

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[25] *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 615, 409 S.E.2d 501, 503 (1991). *See also Colonial Pipeline v. Brown*, 258 Ga. 115, 123, 365 S.E.2d 827 (1988).

> "The actual harm to O'Kelley was slight, but the potential harm to patients in other circumstances supports the punitive damages award here. The purpose of punitive damages, after all, is to deter such conduct. This award, therefore, is consistent both with the nature of the authority's conduct and the potential ensuing injuries. Surely the process is not rendered unconstitutional by permitting the deterrence of potentially dangerous conduct at a point in time when the injury is slight and when only nominal damages may be involved. Society's interest would seem better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided."

To the extent that the *Haslip* decision mentioned the ratio between actual and punitive damages, it did *not* make that comparison a mandatory or dispositive factor in judging the constitutionality of a particular award. Respondent believes that the Georgia Supreme Court faithfully took this dimension of *Haslip* into account and found it to have little utility. Petitioner plainly disagrees but cannot demonstrate that the Georgia Supreme Court decided irrationally (and thus violated due process) in coming to that conclusion.[26]

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[26] For a recent opinion discussing the propriety of allowing a jury to consider both the actual harm inflicted as well as the potential harm threatened in awarding punitive damages, see *Fleming Landfill, Inc., et al. v. Julian Garnes*, ___ S.E.2d ___, 1991 W.L. 258826 (W. Va. Dec. 5, 1991). The West Virginia

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5. As the Georgia Supreme Court noted on remand, Petitioner's argument was limited to "the issue discussed in Division 1", which was the ratio argument. It went on nonetheless to discuss and compare the Alabama and Georgia post-trial procedural schemes. While it found the Alabama post-trial review procedure more structured than Georgia's, it did not see how review under the Alabama approach could have changed the outcome in the present case.

6. In the final analysis, the primary question is whether the Georgia Supreme Court complied with this Court's mandate to reconsider the original *Jones* decision in light of *Haslip*. The response on a reading of the second *Jones* decision must be yes. The Georgia Supreme Court addressed every contention raised by the Petitioner with *Haslip* squarely in view. Petitioner's attempt to make the ratio argument the primary component in the analysis of punitive damage awards does not derive from *Haslip* itself.

The significance of the ratio argument is a matter of public policy on which the states disagree. It is not a substantial constitutional issue for which this Court should establish a bright line rule. If the need to fashion a bright line or single factor due process rule should ever

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Supreme Court in *Fleming* makes specific reference to *Hospital Authority of Gwinnett County v. Jones* and cites it as an example of a case where the life threatening potential of misconduct was sufficient to justify the award of substantial punitive damages.

arise, which is unlikely, this Court can exercise its jurisdiction in a case with a factual record that is fully developed and likely to produce a useful precedent. The present case lacks those characteristics. It also does not present a substantial federal question justifying a place on this Court's oral argument calendar.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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Supplemental Brief of the Hospital Authority of Gwinnett County A-10

IN THE SUPREME COURT OF GEORGIA

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d/b/a GWINNETT AMBULANCE SERVICES,	)	CASE NO. 46956
Appellant,	)	
v.	)	
R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,	)	
Appellee.	)	

BRIEF OF APPELLANT ON REMAND

This is the second appearance of this case in this Court. See *Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989). Following that decision, the Hospital Authority petitioned the United States Supreme Court for certiorari to review the $1.3 million punitive damage award entered by the jury against the Authority, and approved by this Court.

On March 4, 1991, the U.S. Supreme Court decided a long awaited punitive damages/due process case from Alabama, Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___ (59 U.S.L.W. 4157).

On March 18, 1991, that Court entered an order in this case as follows:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Pacific Mutual

Life Insurance Company v. Haslip, 499 U.S. ___ (1991).

A copy of the *Pacific Mutual* opinion is attached hereto for convenience.

This case is now "ripe" for such further consideration.

In this case the Court will recall that William H. O'Kelley was mortally burned in a head-on car/truck collision in Gwinnett County. A helicopter was called to transport O'Kelley.

The senior EMT in charge at the scene, Ms. Beth Burgess, was an employee of Gwinnett Ambulance Services operated by the Hospital Authority of Gwinnett County. Mr. O'Kelley was placed in an ambulance, where Ms. Burgess examined his burns. After she attempted unsuccessfully to begin an IV, she decided to transport Mr. O'Kelley to the closest hospital, Joan Glancy Hospital (operated by the Hospital Authority) (T. 317-318).

While the helicopter was in route to the accident site, the supervisor of Gwinnett Ambulance Services directed the emergency technicians at the scene to transport the patient to Joan Glancy Hospital, which was less than two miles from the accident scene (T. 15), and had on staff two physicians with significant training and experience in treating burn patients. One of these physicians, Dr. Gaskins, who was monitoring EMT radio transmissions, agreed with the decision to transport the patient to Joan Glancy (T. 549).

The helicopter was still about two to three minutes away when the ambulance left the scene. The trip to the

hospital by ambulance took about four minutes (T. 81, 91). The helicopter proceeded to Joan Glancy Hospital, where it landed safely in the parking lot.

Plaintiff introduced the testimony of a Gwinnett Fire Department dispatcher who testified to instances when an emergency patient was not taken to the nearest hospital (as was done here) but instead to one of the Hospital Authority's institutions. He further testified that the reason for bypassing nearer hospitals was to "provide more services to the county."

At the Joan Glancy emergency room, Mr. O'Kelley was treated and stabilized by Drs. Gaskins and Mason (the two experienced physicians referred to above), by the establishment of IV lines which the EMT had been unsuccessful in starting in the ambulance, administration of morphine, and placement of a respiratory tube in the patient's throat after he complained of shortness of breath about an hour after reaching the hospital.

Due to the severity of his injuries, the patient's chances of survival were about 1%. After being examined and x-rayed for the possibility of other injuries, about an hour and a half after arriving O'Kelley was strapped into a stretcher and loaded onto the helicopter, which was owned by a co-defendant, for evacuation to a "burn unit", one which specializes in severely burned patients.

On lift-off from the hospital parking lot, the co-defendant's helicopter hit a light pole and crashed. Experts testified at trial that the accident was caused by "gross pilot error" (259 Ga. at 760), not only for flying into the pole, but also because the water/alcohol tank, which may

have been necessary to give added power to the helicopter engine for assent from such a confined space, was empty (Id.).

Incredibly, O'Kelley was only slightly injured, if at all, in the helicopter crash. After being re-examined at Joan Glancy emergency room, O'Kelley was then transported by ambulance to Grady Hospital, where he died six days later was the result of his burns. The bill for services from Joan Glancy Hospital was $1,216.26.

The Administrator of O'Kelley's estate sued the owner of the helicopter and the Hospital Authority for nominal and punitive damages. No claim for actual damages for personal injury or wrongful death was asserted. The driver of the car which caused the head-on collision and her employer were also sued in separate suits (one of which is still pending).

Plaintiff's counsel contended that punitive damages were warranted because the Hospital Authority allegedly was motivated by profit, rather than patient care, in taking Mr. O'Kelley to one of its hospitals, and the Hospital Authority failed to maintain a proper helicopter landing area. In its earlier opinion, however, this Court observed that generally punitive damages are not authorized for non-performance of a duty and did not base its decision on the alleged failure to provide a proper landing area (259 Ga. at 761, n. 7).

The jury awarded O'Kelley's estate nominal damages of $5,001 against the Hospital Authority and the helicopter owner, jointly. However, the jury awarded punitive damages of $5,000 against the owner of the helicopter and $1.3 million against the Hospital Authority.

This Court affirmed, but that judgment has been vacated and the case has been remanded for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip,* supra.

In *Pacific Mutual,* the Supreme Court described the common law method for assessing punitive damages as follows (59 U.S.L.W. at 4160-4161):

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

The Court concluded that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be per se unconstitutional (59 U.S.L.W. at 4161).

Nevertheless, an award of punitive damages in a particular case may violate due process (59 U.S.L.W. at 4161). The Court then proceeded to consider whether the punitive award in that case violated due process. It concluded that under the procedures utilized in Alabama, that award did not violate due process.

Of crucial significance here, however, the Supreme Court found that "The Alabama Supreme Court's post-verdict review ensures that punitive damages awards . . . have some understandable relationship to compensatory damages" (59 U.S.L.W. at 4162).

Unlike Alabama, Georgia's post-verdict review does not ensure that punitive damages awards have some

understandable relationship to compensatory damages. On the contrary, in its prior opinion in this case this Court acknowledged that "this award appears to bear no rational relationship to the extent of the injury . . . ", saying that lack of such rational relationship was of "no consequence", and holding that the "concept of proportionality as a legal limitation on the amount of punitive damages" is inapplicable in Georgia when such damages are awarded for deterrence (259 Ga. at 762).

The U.S. Supreme Court, on the other hand, has now held that punitive damages awards, even those entered for deterrence, must have some understandable relationship to compensatory damages (59 U.S.L.W. 4162).

Because both the trial court (R. 263) and this Court have found that the $1.3 million punitive damages award in this case bears no rational relationship to the compensatory damages ($5,001 in nominal damages, if nominal damages be compensatory), those punitive damages should be disallowed.

It would appear that there has been intra-court disagreement on the question of whether there must be a relationship between punitive damages and compensatory damages. In *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827 (1988), in an opinion written by Presiding Justice Smith, a $5 million punitive award was found to be excessive because, inter alia, the award did not bear a rational relationship to the actual damages and there was no rational relationship between the offense and the punishment, in that the punitive damage award was 100 times the actual damages (258 Ga. at 123). In

writing for the Court in this case, Justice Hunt distinguished the *Colonial Pipeline* requirement of proportionality.

Later, in *WMH, Inc. v. Thomas*, 260 Ga. 654, ___ S.E.2d ___ (1990), in another opinion by Presiding Justice Smith, the Court set aside the punitive award finding that there was " . . . no rational relationship between the alleged offense and the punishment in that the punitive damage award was almost 400 times the actual damage award of $3,200.00" (260 Ga. at 656). Justice Hunt dissented in *WMH*, saying at one point that "The absence of a discernable relationship between the amount of actual damages and the amount of punitive damages does not necessarily invalidate the latter", citing the earlier decision of this Court in this case.

These different views have now been addressed by the U.S. Supreme Court. Punitive damages awards must have some understandable relationship to compensatory damages (59 U.S.L.W. at 4162). There is no understandable relationship between $1.3 million in punitive damages and $5,001 in nominal damages. The punitive damages awarded against the Hospital Authority are more than 250 times the nominal damages awarded to Mr. O'Kelley's estate (and more than 500 times the nominal damages to be paid by the Authority).

As the United States Supreme Court noted in *Pacific Mutual*, the ratio there, 4.2 to 1, "may be close to the line" (59 U.S.L.W. at 4163). Certainly, 250 to 1 (or 500 to 1) is over the line, and $1.3 million in punitive damages is unconstitutional.

Although this Court recognizes that an "inordinately large deterrence award" may reflect undue passion and prejudice (259 Ga. at 762, n. 9), without a proportionality requirement Georgia has no means for determining which deterrence awards are "inordinately large", other than each Justice's opinion as to what is "large" and what is "inordinate".

The debate over punitive damages is as old as punitive damages themselves. The Supreme Court's decision in *Pacific Mutual v. Haslip* has not resolved the problem; it has prolonged it. Now is the time for this Court to adopt procedures for use by the trial courts (and the Court of Appeals) for reviewing punitive damages awards similar to those adopted in Alabama and approved by the Supreme Court in *Pacific Mutual v. Haslip*.

At a minimum, the Court should set aside the $1.3 million punitive award in this case as being a taking of property without due process of law.

Respectfully submitted,

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IN THE SUPREME COURT OF GEORGIA

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, Individually and d/b/a GWINNETT AMBULANCE SERVICES,	)	CASE NO. 46956
Appellant,	)	
v.	)	
R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,	)	
Appellee.	)	

SUPPLEMENTAL BRIEF OF THE HOSPITAL AUTHORITY OF GWINNETT COUNTY

At oral argument, Justice Hunt asked counsel for The Hospital Authority of Gwinnett County a question substantially as follows:

> Under your view will a comparison between compensatory and punitive damages have to be made in every case in which punitives are awarded?

The purpose of this supplemental brief is to address that question more fully than was done at oral argument.

In our view the U.S. Supreme Court's requirement announced in *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991), that post-verdict review must ensure "that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages"

(111 S.Ct. at 1045) will be necessary in all cases in which punitive damages are awarded *and* in which the defendant assessed with such damages timely raises the due process/taking question in the trial court. It can be expected that, in the normal course of things, a sizable punitive award would be required to "trigger" the due process challenge.

On the other hand, the frequency with which such challenges can be expected should be reduced by the $250,000 "cap" on punitive damages imposed in many instances by the Tort Reform Act of 1987. O.C.G.A. § 51-12-5.1(g).

However, the workload of this Court will not be adversely impacted because once Georgia's scheme for imposing punitive damages has been made to conform to *Haslip*, future challenges to individual punitive damages verdicts will go to the Court of Appeals.

Insofar as the instant case is concerned, the Court may see fit to disapprove, based on *Haslip*, the dicta in *Foster v. Sikes*, 202 Ga. 122, 126, 42 SE2d 441 (1947), and its progeny, that nominal damages will support a punitive damages award. This may be preferable to trying to articulate a relationship between nominal damages (which invariably are in token amounts) and punitive damages.

Respectfully submitted,

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